Supreme Court, U.S.
FILED

(2)

No. 94 440

AUG 24 1994

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FRANK SETOLA,
CHERYL SETOLA,

Petitioners,

vs.

BOB SCHMIDT CHEVROLET, INC.,

and

HYRDA-MATIC DIVISION,
GENERAL MOTORS CORPORATION,

and

GENERAL MOTORS CORPORATION,

Respondents.

APPENDIX FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR SIXTH CIRCUIT

VOLUME I

John G. Rust, Esq.
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Toledo, Ohio 43612
(419) 476-0347

Attorney for Petitioners

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CERTIFICATE OF SERVICE OF APPENDIX

Three copies of the above Appendix are mailed by U.S. Mail this August 24, 1994, to Attorneys Marcia Wagner and David J. Rohrbacher, Nicholson and Light, Attorneys for Defendant-Appellee Bob Schmidt Chevrolet, Inc., One SeaGate, Suite 170, Toledo, Ohio 43604-1555, and Attorneys Ray A. Farris and Dennis A. Lyle, Attorneys for Defendant-Appellee Hydra-Matic Division, and General Motors Corporation, One SeaGate, Seventeenth Floor, Toledo, Ohio 43603-2088.

John G. Rust
Petotioners' Attorney

NOT RECOMMENDED FOR PUBLICATION

No. 93-3247

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK SETOLA, ET AL., Plaintiffs-Appellants, v. BOB SCHMIDT CHEVROLET, INC., HYDRA-MATIC DIVISION, and GENERAL MOTORS CORP., Defendants-Appellees.	F I L E D MAY 26, 1994 LEONARD GREEN, CLERK ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO MEMORANDUM OPINION

BEFORE: RYAN and NORRIS, Circuit Judges; and ENGEL, Senior Circuit JUdge.

PER CURIAM. Plaintiffs appeal from orders of the district court granting summary judgment to defendants.

Having had the benefit of oral argument, and having carefully consider-

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the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in granting summary judgment to defendants.

As the reasons why judgment should be entered for defendants have been articulated by the district court, the issuance of a full written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgments of the district court are affirmed upon the reasoning set out by that court in its memorandum and order dated November 4, 1991, and its opinion and order dated October 14, 1992.

Case No: 93-3247

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

O R D E R

FRANK F. SETOLA:

FILED: JUN 16 1994
LEONARD GREEN, Clerk

Plaintiff - Appellant

CHERYL SETOLA

Plaintiff

v.

BOB SCHMIDT CHEVROLET, INC.; HYDRAMATIC, Division General Motors Corporation; GENERAL MOTORS CORPORATION

Defendants - Appellees

It appearing that the court received a Petition for Rehearing En Bank from the appellant on June 10, 1994 and that the petition was one day late,

It is ORDERED that the untimely PEtition for Rehearing En Banc not be

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accepted for filing.

ENTERED BY ORDER OF THE COURT

(s) Leonard Green,
Leonard Green, Clerk

APP. 4

FILED
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

DOWD, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FRANK SETOLA, et al.,

Plaintiff,

-vs-

Case No. 3:90
CV7317

BOB SCHMIDT CHEVROLET, INC., et al.,

Defendant.

MEMORANDUM
OPINION

This matter is before the Court on plaintiffs' motion to alter or amend the judgment and/or to reconsider and defendants' opposition thereto. Also before the Court is defendant General Motors' motion to strike plaintiffs' motion to alter or amend. Plaintiffs

also seek leave to file instanter an affidavit and a supplemental memorandum. This Court has jurisdiction pursuant to 28 U.S.C. §1332.

BACKGROUND

Frank Setola purchased a 1985 Corvette from Bob Schmidt Chevrolet in December 1985. After taking it back to the dealer on three separate occasions for service work, plaintiff was involved in a collision in which his vehicle rear-ended another and for which he was cited for failure to maintain an assured clear distance. Setola and his wife assert a products liability and negligence claim against the dealer and manufacturer for injuries incurred as a result of the accident.

Originally filed in the Lucas County Court of Common Pleas, plaintiffs

moved for a voluntary dismissal[1] without prejudice on June 22, 1989 and exactly two years later commenced this action asserting diversity jurisdiction.[2] On November 14, 1990, plaintiffs were served with requests for admissions and those requests went unanswered. On April 10, 1991, some four months later, the Court granted defendant's motion for an order journalizing the unanswered

---

[1]The action was originally filed on January 28, 1988. On June 22, 1989 plaintiffs filed for a voluntary dismissal. Prior to the motion for dismissal, General Motors had filed a motion to dismiss for want of prosecution. The Setolas then moved out of state and refiled this action on the last date allowed under the Ohio savings statute.

[2] Plaintiffs, originally residents of Ohio, moved to New Jersey where they now reside.

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admissions[3] and the Court denied plaintiffs' motion for an extension to respond to the requests for admission. Docket No. 19.

Thereafter, on the basis of the journalized admissions, the Court granted defendant's motion for summary judgment and dismissed General Motors

---

[3] Request for Admission No. 1:
Please admit that there was and is no contract between plaintiffs and General Motors Corporation in respect of this 1985 Corvette.

Request for Admission No. 2:
Please admit that this 1985 Chevrolet Corvette was not defectively designed by defendant GM.

Request for Admission No. 3:
Please admit that this 1985 Chevrolet Corvette was not defectively manufactured by defendant GM.

Request for Admission No.4:
Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred in plaintiffs' complaint.

See Docket No. 15,Exhibit A at pp.5,11, 12, and 21.

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from the case. See Docket No. 55, dated November 4, 1991. ONe month later, Bob Schmidt moved for summary judgment and plaintiffs submitted their opposition thereto. On June 17, 1992, plaintiffs moved for withdrawal and or amendment of the admissions and sought to vacate the summary judgment in favor of General Motors. The Court denied plaintiffs' motion as well as a subsequent motion for reconsideration. See Docket No. 83. In addition, the Court granted Bob Schmidt's motion for summary judgment and terminated the case. Id. Plaintiffs' now move to alter or amend the judgment and alternatively move for reconsideration.

First, it appears to the Court that plaintiffs are moving for reconsideration of orders which have already

reconsidered issues involving the withdrawal of admissions and summary judgment granted to General Motors. See Docket Nos. 71 and 83. As these issues have already been reconsidered and denied, the Court finds plaintiffs' motion not to be well taken and denies the same.

Second, plaintiffs' move for reconsideration of the summary judgement granted to Bob Schmidt on October 14, 1992.

While a motion for reconsideration is not mentioned in the Federal Rules of Civil Procedure, it serves a legitimate and valuable role in certain situations. National Union Fire Ins. Co. v. Continental Illinois Corp., 116 F.R.D. 252, 253 (N.D. Ill. 1987), citing Above the Belt, Inc. v. Mel Bohannan

Roofing, Inc., 99 F.R.D. 99 (E.D. Va. 1983). Generally, there are three major situations which justify a court reconsidering one of its orders:

> (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or to prevent manifest injustice.

Kern-Tulare Water Dist. v. Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986), aff'd in part, rev'd in part 828 F.2d 514 (9th Cir. 1987), cert denied, 486 U.S. 1015 (1988).

The motion for reconsideration must demonstrate to the court why it should reconsider its decision and set forth strongly convincing facts or law which would induce it to reverse its prior decision. Shields v. Shetler, 120 F.R.D. 123, 126 (D. Colo. 1988). Motions for reconsideration are not sub-

stitutes for appeal nor are they vehicles whereby a party may present arguments inexplicably omitted in prior proceedings. Karr v. Castle, 768 F. Supp. 1087, 1093 (D. Del. 1991), citing Brambles U.S.A., Inc. v. Blocker, 735 F. Supp. 1239 (D. Del. 1990).

In the present case, plaintiffs' sole argument in favor or reconsideration assumes that the withdrawal of admissions is successful. As stated above, this Court has already spoken on that issue and has determined that it does not warrant a second reconsideration. Accordingly, plaintiffs' motion for reconsideration regarding this Court's granting of summary judgment in favor of defendant Bob Schmidt is not well taken.

Finally, in light of the above, plaintiff's motion for leave to file instanter the affidavit of Ervin Leshner and to file a supplemental memorandum regarding the motion for reconsideration is denied as moot.

IT IS SO ORDERED.

(s) David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. DISTRICT JUDGE

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FILED
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CLERK US DISTRICT COURT
FOR NORTHERN DISTRICT OF
OHIO, WESTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FRANK SETOLA,
et al.,

Plaintiff, Case No. 3:90CV7317

-vs-

BOB SCHMIDT CHEVROLET,
INC., et al.,

Defendant.

OPINION AND ORDER

WALINSKI, J.

This matter is before the Court on plaintiffs' motion for reconsideration, Bob Schmidt and General Motors' motions to strike plaintiffs' motion for reconsideration and plaintiffs' motion for leave to file affidavits. Also before the Court are defendant's motion for summary judgment, defendant's motion to strike affidavits, plaintiffs' motion

for leave to file and plaintiffs' third motion for extension of time and replies thereto. This Court has jurisdiction pursuant to 28 U.S.C. §1332.

Plaintiffs seek reconsideration of this Court's August 4, 1992 Memorandum and Order wherein their motion for withdrawal of admissions was denied. While a motion for reconsideration is not mentioned in the Federal Rules of Civil Procedure, it serves a legitimate and valuable role in certain situations. Nat'l Union Fire Ins. Co. v. Continental Illinois Corp., 116 F.R.D. 252, 253 (N. D. Ill. 1987), citing AboveThe Belt, Inc. v. Mel Bohannan Roofing, Ind., 99 F.R.D. 99 (E.D. Va. 1983).

Generally, there are three major situations which justify a court reconsidering one of its orders: "(1) an in-

tervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or to prevent manifest injustice." Kern-Tulare Water Dist. v. Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986), aff'd in part. rev'd in part 828 F. 2d 514 (9th Cir.), cert. denied 486 U.S. 1015 (1988). However, the motion for reconsideration must demonstrate to the court why it should reconsider its decision and set forth strongly convincing facts or law which would induce it to reverse its prior decision. Shields v. Shetler, 120 F.R.D. 123, 126 (D. Colo. 1988). Motions for reconsideration are not substitutes for appeal nor are they vehicles whereby a party may present arguments inexplicably omitted in prior proceedings. Karr v. Castle, 768 F.

Supp. 1087, 1093 (D. Del. 1991), citing Brambles U.S.A., Inc. v. Blocker, 735 F. Supp. 1239 (D. Del. 1990).

In the case sub judice, plaintiffs presents no justifiable reason for consideration of the previous decision. Instead, plaintiffs' argue that defendants' motion to journalize the admissions came as a surprise as GM failed to utilize Local Civil Rule 3.04[1] to convey the seriousness of the admissions. Coun-

---

[1] Local Rule 3.04 reads in pertinent part:

> To curtail undue delay in the administration of justice, no discovery procedure . . .to which objection or opposition is made by the responding party shall be taken under consideration by the Court unless the party seeking discovery shall first advise the Court in writing that, after personal consultation and sincere attempts to resolve differences, the parties are unable to reach an accord..

(emphasis added). The Court notes that the Local Rules were amended as of January 1, 1992.

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sel for plaintiff indicates that had this procedure been implemented, "the matter would have been worked out". However, counsel for plaintiffs should be aware that requests for admissions and response time thereto is clearly addressed within the Federal Rules of Civil Procedure and does not require more of opposing counsel before seeking journalization of admissions. Plaintiffs' Motion for reconsideration is not well taken. Accordingly, defendants' motions to strike the motion for reconsideration and plaintiff's motion for leave to file affidavits in opposition to the motions to strike are denied as moot.

The Court now turns to Bob Schmidt's motion to strike the affidavits of Frank Sedola and Alan J. Karoly. It is Bob Schmidt's contention thatthe Af-

fidavits do not meet the requirements of Rule 56(e) and cannot be considered in opposition to the motion for summary judgment.

Rule 56(e) states in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn to certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

As to the three requirements regarding affidavits submitted in opposition to a motion for summary judgment, Bob Schmidt argues that plaintiff's affidavit devoid of personal knowledge as it is written in the third person and is therefore not a sworn statement of the affiant. Defendant also states

that the affidavit, even if cured of this defect, does not contain any admissible evidence sufficient to oppose the motion for summary jdugment.

A review of Setola's affidavit finds that it differs in form to that of a traditional affidavit but nevertheless contains the sworn affirmation of the affiant as to its contents on the last page. While the majority of the affidavit is written in the third person, that factor alone cannot render the affidavit defective as Setola avers the statements contained therein as his own.

However, whether the affidavit contains admissible evidence sufficient for the Court's consideration is a different issue altogether. The rule is clear that information contained within the affidavit must be within the

affidavit must be within the personal knowledge of the affiant. Fed. R. Civ. P. 56(e). However, such information cannot be based on a belief as it would constitute speculation and be inadmissible in court. Schertz v. Waupaca County, 875 F.2d 578, 582 (7th Cir. 1989). Conclusions of law are not appropriate within an affidavit. 6 J. Moore & J. Wicker, Moore's federal Practice ¶56.22 [1] (2d ed. 1988). However, where the court can separate the conclusions and speculation from the admissible evidence, it may strike those portions of the affidavit Id. ..

In this case, the Setola's affidavit is a running narrative replete with self-serving declarations, speculation and inadmissible "evidence" running some twenty-eight pages long and

containing a portion of second affidavit. The Court need not wade through and excise the stricken portions where such speculation is intertwined throughout the entire affidavit. Accordingly, the Court finds Bob Schmidt's motion to be well taken and Frank Setola's affidavit is hereby stricken.

Second, Bob Schmidt requests that Alan J. Karoly's ("Karoly") affidavit be stricken as it also fails to comport with the mandates of Rule 56(e). First, defendant takes issue with Karoly's competency as an expert. Karoly identifies his auto mechanic experience and certification as a Master Automotive Technician by the National Institute of Automotive Service Excellence ("ASE"). HE further states that he worked as a mechanic for a local dealer for some two

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and one half years before starting his own towing business in 1986. While Karoly's qualifications regarding his expertise of braking systems is minimal, he has not demonstrated knowledge of Corvette braking systems which would render his opinion that of an expert. His statement that he has "worked on Corvettes and their brake systems" is not a sufficient basis to warrant expert status. For these reasons, the Court finds defendant's motion to be well taken and will strike Karoly's affidavit.

The Court now turns to Bob Schmidt's motion for summary judgment and give a brief recitation of the facts. This case was filed in this court in June 1990 after having been voluntarily dismissed the action in state court.[2] Frank Setola bought a 1985 Chevrolet

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juries incurred as a result of the accident. Bob Schmidt has filed for summary judgment and plaintiffs' submit their opposition thereto.

Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The jdugment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute. United States v. Articles of Device, 527 F. 2d

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(Footnote #2)

[2] Originally filed in the Court of Common Pleas in Lucas County, plaintiffs filed for a voluntary dismissal without prejudice on June 22, 1989. Thereafter, on June 22, 1990, plaintiffs filed this diversity action against the same defendants.

Corvette from Bob Schmidt on December 3, 1985 and alleges that he experienced brake problems and returned the car to the dealer for repairs. The last repair work done by Bob Schmidt is dated as January 23, 1986. Setola states that he relied upon the dealer's representation that the car was fine to drive. On January 30, 1986 Setola was involved in an accident with the vehicle and was cited for failure to maintain an assured clear distance. Plaintiff and his wife assert a products liability and negligence claim against the dealer for in-

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1008, 1011 (6th Cir. 1976); Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193, 1195 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion." Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts, viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. Smith v. Pan Am World Airways, 706 F.@d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses."

Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on

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file, designate specific facts showing a genuine issue for trial. Celotex Corp. v. Catrett 477 U.S. at 324.

In bringing a negligence action, the plaintiff must establish 1) a duty; 2) a breach of that duty; and 3) an injury which proximately results from the breach. DiGildo v. Caponi, 18 Ohio St.2d 125, 247 N.E. 2d 732 (1969); Menifee v. Ohio Welding Products, Inc., 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). To defeat a motion for summary judgment, the plaintiff must identify the duty owed and the evidence must be sufficient to allow reasonable minds to infer that the duty was breached which proximately caused plaintiff's injuries. Keister v. Park Centre Lanes, 3 Ohio App.3d 19, 22-24 (1981).

The Setolas have submitted that there is a duty by a service department when repairs are undertaken and a vehicle is re-

turned for use to the owner. Sonja P. Soehnel, Annotation, Product Liability: PErsonal Injury or Death Allegedly Caused by Defect in Braking System in Motor Vehicle, 99 A.L.R. 3d 179 (1980). Plaintiffs next assert that Bob Schmidt breached this duty by selling him a defective vehicle and failing to repair the brake problems prior to the accident. In support of this, Setola states in answers to Bob Schmidt's interrogatories that the car was taken back to defendant's shop three times for problems with the vehicle's brakes.

The first repair order dated 12/9/85 gives no indication of brake problems. The work done according to the repair order dealt with adjsuting the timing, performing injector balance test and ordering injectors. Defendants' Exhibit B. The second work order dated 12/19/85 indicates problems as being

"rear brakes lock up" and "rear axle lks". The car mileage was 3233. However, the service manager's affidavit states that the work order was voided as plaintiff was unable or unwilling to wait for the repair work. The third repair order was dated January 23, 1986 with the car mileage reading 7194. The complaints listed included rattles in the dash, door shutting hard, transmission shifting too soon, car stalling, coolant leak, horn and alarm won't operate among others. Most pertinent to this discussion is the notation "Ck for rear axle lk" and "left rear wheel and wheel seeming to lock up at times". This is followed by the dealer's conclusion "No leaks at this time". The repair order also indicates that the vehicle was road tested and the service manager avers that it is the standard and ordinary custom of their dealership to test the braking system of a vehicle before turn-

ing it back over to the owner.

Plaintiff's contention is that defendant failed in its duty to repair the car, but no evidence properly before the Court demonstrates that defendant breached its duty. More troublesome to plaintiff's case, however, is the element of proximate cause.

In Jeffers v. Olexo, supra, the court described proximate cause as:

> 'That which immediately precedes and produces the effect as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstance; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated. '. . .

Id. at 143. (citations omitted).

Defendants submit the affidavit of Nancy McCray, an eyewitness to the accident in question. McCray's vehicle was in front of the car impacted by the Setola vehicle. It was McCray's observation that the Setola

vehicle was approaching at a high rate of speed so much so that it would not have been able to stop before hitting the car behind her. Bob Schmidt also submits Officer Thomas G. MEdon's deposition as Officer Medon investigated the collision. The police report corroborates McCray's affidavit and indicates that Mr. Setola was cited for failure to maintain assured clear distance. In his deposition, Medon did recall that Mr. Setola mentioned brake problems prior to the accident. However, Medon stated that there was no demonstrable indication that the vehicle was at fault which resulted in the citation to plaintiff.

In addition, defendants cite to the affidavit and report of Lawrence F. Wilson as supporting a finding of summary judgment for Bob Schmidt. Wilson, a professional engineer, was secured by plaintiff's insurer to investigate the claim of brake failure.

Wilson's report states that the brake fluid in the master cylinders and wheel cylinders was contaminated with mineral oil and further:

> In our opinion, the brake fluid contamiantion of mineral oil caused the distortion of the master cylinder caps. It was impossible, however, to prove that this had any effect on the braking actions of the vehicle, because no distortions were found in the brake line hoses nor the wheel cylinder caps.

Doc. #70, Exhibit B. (emphasis added).

Finally, admissions by the plaintiffs are offered by Bob Schmidt as evidence that the issue of causation is clearly not a question of fact:

> Request for Admission No. 4: Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred in plaintiffs' complaint.
>
> Response: Deemed admitted and journalized.

Plaintiffs argue that this judicial admission cannot provide comfort to Bob Schmidt

as it was sought by GM. However, the complaint with its allegations of product liability was as against both Bob Schmidt and GM. The fact that one defendant sought an admission does not preclude its use against the second defendant especially when it goes to the same issue. Taking into account all the above presented evidence, it is clear that there is no genuine issue of material fact as to proximate cause. Furthermore, the undisputed facts even when viewed in a light most favorable to the plaintiff, clearly demonstrate that defendant is entitled to summary judgment on the negligence claim.

Finally, as to the product liability claim, the Court msut also find in favor of the defendant on the issue of proximate cause as there is an absence of evidence to the contrary. See, State Farm Fire Co. & Casualty v. Chrysler Corp., 37 Ohio St. 3d 1,

5-6, 532 N.E.2d 489 (1988) (PReponderance of the evidence in a products liability claim must demonstrate that the defect was the direct and proxiamte cause of the plaintiff's injuries.)

Accordingly, it is

ORDERED that plaintiffs' motion for reconsideration is denied.

FURTHER ORDERED that defendants' motions to strike the motion for reconsideration is denied as moot.

FURTHER ORDERED that plaintiffs' motion for leave to file affidavits in opposition to the motions to strike is denied.

FURTHER ORDERED that defendants' motion to strike affidavits is granted.

FURTHER ORDERED that plaintiff's motion for extension of time to file additional affidavits in opposition to motions to strike is denied.

Cause dismissed.

(s) Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U. S. DISTRICT JUDGE

TOLEDO, OHIO
October 14, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FRANK SETOLA, et al.,

Plaintiff,

vs.

BOB SCHMIDT CHEVROLET, Inc., et al.,

Defendant.

FILED:AUG 4 '92
AM10:28
CLERK U.S. DISTRICT COURT,NORTHERN DISTRICT OF OHIO
TOLEDO

Case No. 3:90 CV7317

MEMORANDUM AND ORDER

WALINSKI, J.

This matter is before the Court on plaintiffs' motion for withdrawal of admissions and motion to vacate summary judgment. Defendants submit their opposition thereto. This Court has jurisdiction pursuant to 28 U.S.C. §1332.

This is a products liability action wherein Frank and Cheryl Setola ("Setola" allege claims sounding in negligence and strict liability against Bob Schmidt Chevrolet, Inc. ("Bob Schmidt") and General Motors Corporation ("GM"). There is no dispute that on November 14, 1990, GM served plaintiffs with discovery requests. Contained within the discov-

ery request was a request for admissions. GM then moved the Court for an order journalizing these admissions on March 18, 1991. Plaintiffs responded by requesting an extension of time to respond to the request for admissions. Up until this time, plaintiffs neither responded nor requested an extension of time.

This Court, on April 10, 1991 granted the motion to journalize the admissions and deemed them admitted. In addition, plaintiff's motion for an extension of time was denied. Shortly thereafter, GM moved for summary judgment based upon the deemed admissions to which plaintiffs filed an opposition and several affidavits in support. On November 4, 1991, the Court granted GM's motion for summary judgment and dismissed GM as a party defendant. One month later, Bob Schmidt also filed for summary judgment and that motion is also pending

before this Court. On June 17, 1992 plaintiffs filed their motion for withdrawal or to amend the admissions and to vacate the summary judgment order as to GM.

Rule 36(b) states in part:

> Effectof Admission. Any matter admitted under this rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the Court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

Fed. R. Civ. P. 36(b). (emphasis added). The Court is permitted to exercise its discretion when considering the withdrawal or amendment of an admission. J. Moore & J. Lucas, 4A Moore's Federal Practice ¶36.08, 36-77 (2d ed. 1992). Two considerations for the Court include 1) whether presentation of the merits of the action will be served by

withdrawal; and 2) the party who obtained the admissions must satisfy the court that withdrawal will prejudice maintaining a defense. Id. at 36-78.

The court in U.S. v. Kasuboski, 834 F.2d 1345 (7th Cir. 1987) elaborated upon the purpose of the rule:

> Rule 36 allows parties to narrow the issues to be resolved at trial by effectively identifying and eliminating those matters on which parties agree. This function would be lost if aprties were permitted to contest under Rule 56 a matter concluded under rule 36. As the advisory committee observed, "[u]n]less the party securing an admission can depend on its binding effect, he [or she] cannot safely avoid the expense of preparing to prove the very matters on which he [or she] has secured the admission, and the purpose of the rule is defeated." Fed. R. Civ. P. 36 advisory committee's note.

Id at 1350. The defendants in Kusaboski, sought to attack default admissions by way of opposing the plaintiff's motion for summary judgment. The court took issue with defendants' failure to utilize the proper procedural vehicle before affirming sum-

mary judgment in favor of plaintiff. In the present case, the motion to journalize the admissions was decided before GM's motion for summary judgment was filed. NEvertheless, plaintiffs also tried to dispute the admissions within their opposition to the motion for summary judgment but the Court granted summary judgment to GM on November 4, 1991. Seven months later plaintiffs filed this motion to withdraw.

Plaintiffs assert they will suffer a manifest injustice should the Court deny them the requested relief. Certainly the deemed admissions cut at the heart of plaintiffs' claims and allowed GM to succeed on its motion for summary judgment. However, the Court must also consider the prejudice, if any, which may befall GM.

Plaintiffs place great emphasis on the assertion that defendants have the burden of demonstrating prejudice by virtue of lost evidence. GM disputes this statement

arguing that the loss of evidence may be a factor in establishing prejudice to its case. This Court agrees. The party opposing the withdrawal must demonstrate that it will be prejudiced in maintaining a defense. See 999v. C.I.T. Corp., 776 F.2d 866 (9th Cir. 1985). In this case, GM relied upon the journalized admissions when it submitted its motion for summary judgment on June 12, 1991. In fact, the docket sheet indicates that any discovery on the part of GM ceased after the filing of Officer Thomas G. Medon's deposition. See, Docket Nos. 25 and 26. Certainly, after GM prevailed on the motion for summary judgment and was dismissed from the case, it would not be expected to continue to prepare its case. At this point, seven months after the admissions were deemed admitted, GM relied upon the effect of the admissions and assumed that its role in this case was con-

cluded. For plaintiffs to submit their motion to withdraw admissions seven months after GM was dismissed from this case and fourteen months after the journalized admissions were deemed admitted would no doubt prejudice defendant's case.[1] Cf. Howard v. Sterchi, 725 F. Supp. 1572 (N.D. Ga. 1989) (Court granted plaintiffs' motion to withdraw made 14 months after the admission and one month after defendants filed for summary judgment. Defendants were awarded costs and expenses incurred as a result of their reliance on the admissions).

Even where the requirements under the rule favor the movant, the Court may exer-

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[1] The Court also notes that plaintiffs' responses to GM's first set of interrogatories served on November 14, 1990 were returned on June 10, 1992.

cise its discretion in disallowing withdrawal of admissions. Kleckner v. Glover Trucking Corp., 103 F.R.D. 553, 557 (M.D. Pa. 1984); Donovan v. Carls Drug Co., 703 F.2d 650, 652 (2d Cir. 1983). The purpose of admissions is to facilitate proof and narrow the issues. Fed. R. Civ. P. 36 advisory committee's note. The Court recognizes the importance of resolving the action on the merits but in this case finds that the reliance of GM upon the deemed admissions, plaintiff's dilatory actions, and the purpose of admissions would be severely undermined were the Court to allow withdrawal at this late date. Accordingly, the Court, in its discretion, finds plaintiffs' motion not well taken and also denies the its decision granting summary judgment to GM.

Therefore, it is

ORDERED that plaintiffs' motion to permit withdrawal and/or amendment of ad-

missions against plaintiffs on General Motors requests for admissions is denied.

FURTHER ORDERED that plaintiffs' motion to vacate interlocutory summary judgment in favor of General Motors is denied.

(s) Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U. S. DISTRICT JUDGE

TOLEDO, OHIO

FILED
91 JUL -1 PM 3:43

CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Frank Setola, et al.,

Plaintiffs,

vs.

Bob Schmidt Chevrolet, Inc. et al.,

Defendants.

* CASE No. 3:90 CV7317

* JUDGE NICHOLAS J. WALINSKI

* AFFIDAVIT OF FRANK F. SETOLA SUBMITTED BY SUMMARY JUDGMENT MOTIONS.

* John G. Rust
* 4628 Lewis Ave.
* Toledo, Ohio 43612
* (419) 476-0347
* Attorney for Plaintiffs
* O.S.CT.#0000098

* * * * * * * *

CERTIFICATE OF SERVICE

A copy of the foregoing Affidavit is served upon Counsel for the Defendants, Bob Schmidt Chevrolet, Inc., Attorney Marcia A. Wagner, One SeaGate, Suite 710, Toledo, Ohio

43604, and Attorney Ray A. Farris, for General Motors, Fuller & Henry, One SeaGate, Suite 1700, Toledo, Ohio 43603, by First Class U.S. Mail this 1st day of July, 1991.

(s) John G. Rust
John G. Rust Attorney

State of New Jersey)
SS
County of

AFFIDAVIT OF FRANK F. SETOLA, JR.

Frank F. Setola, Jr., being first duly sworn, deposes and states that this Affidavit is true to the best of his recollection, and of his personal knowledge:

1. I, Frank F. Setola, Jr., purchased from Bob Schmidt Chevrolet, Inc., Defendant herein, a new 1985 Chevrolet Corvette, as shown by the retail installment sale contract, attached hereto, as Exhibit A and was given the warranty and other papers entitled "Silver Medallion customer delivery receipt, with "warranty and owner assistance Information booklet", as shown on Exhibit B with the odometer statement of 92 miles.

2. In my use and in regard to the repairs on the said Corvette, the only garage was Bob Schmidt Chevrolet, Inc. which did any work on the said Corvette before the uncalled for collision of January the 30th, 1986, when because of the brakes' failure, I was unable

to stop the car, and struck a car ahead on the Anthony Wayne Trail, Southbound, at City Park, Toledo, Ohio. If it had not been for the failure of the brakes, I would not have hit this car, as I was not going fast whenever I first saw the lady's car stopped up ahead, and I would have stopped, but when I pressed hard on the brake, the brake would not do anything; and the brake pedal would not go down, and I had to do what I could, and I did, in trying to slow the car down by the compression and transmission was unable so to do.

3. As stated above, this Corvette was not worked on by any other garage, or repair people, except the Bob Schmidt Chevrolet, Inc., from the time that I got it, until the time of the aforesaid collision.

4. I further state that this car was taken back <u>at least</u> 4 times to Bob Schmidt Chevrolet, hereinafter referred to as Bob Schmidt, before the said collision of Jan-

uary the 30th, 1986. In the statements that I made in the "Plaintiffs' Supplemental Answers to Bob Schmidt Interrogatories and Request for Production of Documents", are true and I refer specifically, to page "_6C_ and page _6D_ and 6E_", copies of which are attached hereto and made a part hereof and also page 66I_ in my handwriting.

Statement of History of Condition of Damaged Corvette, After Collision of January the 30th, 1986

5. From the scene of the accident, I had the car towed, as is, to the Five-Point Road near Maumee, where I was staying, by one JErry Sybert. AFter the collision, the hood was so damaged, that one could not pull it up nor open the hood. The hood was not opened, until later at the American Customs, then, I was present, and I believe Mr. Clarence Werner, and possibly others were then present. I know that the hood was in the same condition when finally the car was towed to the American Customs, in Toledo, Ohio, in the

CONTINUATION OF ANSWER TO INTERROGATORY 8

B. December 19, 1985, Bob Schmidt Work ORder or invoice, 56862, with problems and failures to function, reported as "Rear brakes lock up, Rear Axle locks - at times loud tapping noise in engine - Very poor gas mileage and stalls and stops - all indicating serious brake problems and brakes locking and entine not turning over freely due to faulty brakes, engine running hot due to wheels not turnign freely, and

C. Again on or about January we, 1986, when the said Corvette was seen by Bob Schmidt to have the same problems as before, same brake failures, poor gas mileage, car stalling out due to brakes locking, rear axle lock, and which seems to lock up at times, and also, Corvette had vibrations in car when over 45 mph, seems to be rear, again indicating brakes locking and not func-

first part of February, 1986, as it had been immediately after the collision, and that the hood had not been raised. Likewise, know that there was no change to occur on the appearance of the outside of the engine parts, from the time that the hood was first opened, at American Customs, until the car was taken to the Dave White Chevrolet, and that likewise, then, there was brake work done at the Dave White Chevrolet, as reported by professional Engineer Lawrence F. Wilson, President, Product Analysis and Structural Testing, Inc., as shown in his report, No. 209586.

Statement of History of Failure of Corvette To Function As Intended and Warranted; and Denial of NOrmal Use of Corvette

The Corvette was in Bob Schmidt Chevrolet, Inc. for repairs, for these times at least, being the following:

Work Order No:

1) 56387 12/9/85 to
2) 56862 12/19/85 to Rear brakes axle locks. lock up, Rear
3) 1/4/86 to 1/
4) 1/16/86 to 1/ /86
5 57828 1/23/86 to 1/ /86

tioning as intended nor properly, wheels locking; and again "balance four wheels, R&R Cust. wheel locks";

Answering further to Interrogatory No. 8, Plaintiffs state that Bob Schmidt was negligent, and acted in bad faith, recklessly, and dangerously, in on receiving information shown on the said invoices and Work Orders of December 9, 1985, December 19, 1985, and January 23, 1986, should have inspected the fluid in the Corvette's brake system, by checking the Master Cylinder, and then the danger of the swelling of the seals in the proportion valve, the Master Cylinder and other parts of the brake system would have shown that the brake fluid in the brake system was contaminated, just as was seen and evidenced by the not to be expected color, reported by Engineer L.F.Wilson as "Grayish", of the brake fluid scattered over the engine, when the hood was first opened at American Customs, after the fateful collision of Jan-

uary 30, 1986 on the Anthony Wayne Trail.

CONTINUATION OF ANSWER TO INTERROGATORY 8

While Mr. Setola was in New Jersey, the Corvette kept on dying every time he touched the brakes it would die, at a corner, when he put his foot on the brakes, and when the car went through a stop sign in New Jersey, and he had it towed back to Bob Schmidt, due in part at least to the bad brakes. At Bob Schmidt's Chevrolet he arrived there around January the 4th, 1986. And the Corvette was returned to him around January the 15th, 1986; and then the Corvette, same car, was back with Bob Schmidt January the 16th the next day, brakes not working; brakes were squeaking very loudly, would not stop at a full stop; very hard pressure to stop the car; almost impossible at certain speeds downshifting was the only way to slow down.

And on January the 29th, 1986 Bob Schmidt's telephoned Mr. Setola approximately 4:30 in the afternoon to pick up his vehicle.

He did. Drove it to his Mother's residence about one and one half blocks away, and he immediately called back to Bob Schmidt's telling them that the car would, was not stopping, acted very strange, pulling to the side, making all kinds of noises; and on January the 29th the car was returned, the brakes were not functioning any better, nor did the brake pedal go down or respond when the pressure was applied - - all work under warranty and Bob Schmidt told Mr. Setola that Mr. Setola was just imagining problems, that there were no problems. Told him to test drive it the next morning; he did, and decided to take the Corvette in to Bob Schmidt's, after he took his wife to work in downtown Toledo. At that time the brakes were straight up, nothing to move, couldn't push it down; Mr. Setola called Bob Schmidt and was again told that it was all in Mr. Setola's imagination. As the car was operated, it made all kinds of metal sounds, loud humming

noises, and the car would shake.

CONTINUATION OF ANSWER TO INTERROGATORY 8.

I was in NJ about December 29, 1985 where I was having problem with my Corvette. The brakes were not functioning properly; had to push hard to stop vehicle, car, then, would stall. This took place in NJ. Took car into "Town & County Chevrolet" of Tom's River, NJ. Service Managers, Mike and Jerry, refused to work on 1985 Chevrolet Corvette due to the problems of the vehicle. They stated that I should bring vehicle back to original dealer - - "Bob Schmidt Chevrolet of Toledo, Ohio." The car then had to be towed from NJ to the dealer "Bob Schmidt Chevrolet of Toledo, Ohio". When I got back into Ohio I went to the Service Dept. of 'Bob Schmidt Chevrolet" and told Service Manager that the car kept dying when I had applied brakes and car was hard to stop, peddle was hard to push.

(Retail Installment Contract and GM "Customer Delivery Receipt" of 12/3/85, omitted

AFFIDAVIT SIGNATURE PAGE

Have you read your foregoing Affidavit of ____ number of pages, including this page? x _____

Do you swear before me, a Notary Public, State of Ohio that your statements, to the best of your recollection are true?

yes
yes

(s) Frank F. Setola
Signature of Affiant

Sworn to before me and subscribed in my presence this 29th day of June, 1991.

(s) Joseph Apicelli

JOSEPH APICELLI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 5, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Frank Setola, et al.,

Plaintiffs,

vs.

Bob Schmidt Chevrolet, Inc., et al.,

Defendants.

FILED 92 JAN-7 PM 4:13
Clerk U.S.DISTRICT COURT NORTHERN DISTRICT OF OHIO TOLEDO

Case No. 3:90 CV7317

Judge Nicholas J. Walinski

AFFIDAVIT OF FRANK F. SETOLA SUBMITTED BY PLAINTIFFS IN OPPOSITION TO SUMMARY JUDGMENT motions.

John G. Rust
4628 LEwis Avenue
Toledo, OHio 43612
(419) 476-0347
O.S.CT. #0000098
Attorney for PLaintiffs

A copy of the foregoing Affidavit is served upon Counsel for the Defendants, Bob Schmidt Chevrolet, Inc., Attorney Marcia A. Wagner, One Seagate, Suite 710, Toledo, Ohio 43604, and ATtorney Ray A. Farris, for General Motors, Fuller & Henry, One Seagate, Suite 1700, Toledo, Ohio 43603, by First

Class U.S. Mail this 7th day of January,

(s) John G. Rust

John G. Rust
Attorney for Plaintiffs

AFFIDAVIT OF MR. FRANK F. SETOLA

REPRESENTATIONS AND STATEMENTS BY MR. TRAVIS NEELY, BOB SCHMIDT, SALESMAN

The title papers, and the various purchase papers for the 1985 Corvette, purchased by Mr. Setola, from the Bob Schmidt Chevrolet Company, have a number of dates of December 3, 1985. On the day before Mr. Setola signed the final purchase papers, he test drove, a gray Corvette, and it ran and performed fine, without any complaints or notice to Mr. Setola of any defects whatsoever. The next day, Mr. Setola came back, in the afternoon as he recalls, and then, asked to test drive the Corvette which was being looked at by Mr. Neely and him. As MR. Setola test drove the Corvette and MR. Neely was with him, Mr. Setola told him that the brake pedal did not press down like a brake pedal ordinarily does,

and that it was hard and that it would only go down about one-quarter of an inch. MR. NEely said that Corvettes were made like that. LIkewise, Mr. Setola told Mr. Neely that in pressing the brake pedal, that he had to press harder than he would on other cars, and MR. Neely said that that was the way the Corvette was made and works. MR. Neely said to drive it like that, and it will start loosening up. Mr. Neely also said, "This is a new car; it's the best car that Chevrolet makes, it runs perfectly, and if anything develops with the car, we'll make good on it, just as we have made good on other cars before, that you have purchased from us."

Mr. Setola states that on prior deals, that Bob Schmidt had made good on everything that they said they would, made good, in regards to the condition of the car, as regard to everything else. MR. Setola then decided to buy the new car as a new car and so relied up the statements by Mr. Travis

Neely. From what Mr. Neely said, Mr. Setola, thought that the brakes were in their good, operating condition, and were operating just as General Motors and the Chevrolet company expected, this Corvette, and all Corvettes to operate, when they were new like this.

(2)

FIRST COMPLAINTS ABOUT CORVETTE TO BOB SCHMIDT CHEVROLET

DECEMBER 5, 1985

Mr. Setola recalls, that about two days, after he had purchased the car, he drove the car to Loma Linda, Airport Highway, just east of the Toledo Airport, north side of Airport Highway, generally in the area of the Ohio State Police Station. Mr. Setola was there to meet his friend, Bob, last name now not recalled.

Bob was already int he parking lot, and Frank was going to drive his Corvette to take Bob back to Bob's house before they ate. Frank tried to start the Corvette; it would not start. The starter was turning over the

engine real slow. Mr. Setola then called Mr. Travis Neely at Bob Schmidt. MR. Neely said they would send a tow truck out right away to get the car. About forty-five minutes later, the tow truck came. The tow truck driver came inside Lima Linda's found Mr. Setola, and all four men went back out to the Corvette. The Bob Schmidt tow truck man drove the Corvette away on a flat bed truck. Mr. Setola rode in the tow truck, back to Bob Schmidt. MR. Setola went right to Mr. Travis NEely. Mr. Neely said that he would take care of the problem, not to worry about it. Bob then dropped Mr. Setola off at Mr. Setola's mother's place, Mrs. Barbara Davis, 333 Rexham Lane, Maumee, Ohio 43537. Then, under two hour's time, Mr. Travis Neely called Mr. Setola and told Mr. Setola that he could pick up the car, and the Bob Schmidt mechanic said that the injectors were off balance, and this was his explanation of the problem that the Corvette had been facing.

/(End of p.3)

Coming back to a description of how the car had performed, Mr. Setola said that from the very first time that the had received the car, that it had not functioned nor run like the first Corvette which he had test driven. As to the Corvette in question, which he had bought, and was tendered by Bob Schmidt, Mr. Setola had continued to notice that the car had not sounded right, nor run like the car which he had test driven. When he had driven into Loma Linda's, he had made right hand turn, and at that time, the car had stalled and died. He then re-started it, with difficulty, and after it had turned over a few times. HE then parked the car, then he met Bob as stated above, and the Corvette would not start, and this caused Mr. Setola to call Mr. Travis Neely at Bob Schmidt. At that time, at the Loma Linda, the Engine Light had not come on except as is normal, when you turn on the ignition.

The Corvette had then been returned

to MR. Setola on December 7, at the Bob Schmidt Chevrolet Garage. When he received the car from Bob Schmidt, Mr. Travis Neely and another person, walked to his car with him, Mr. Neely gave him the keys, said everything is fine, and Mr. Setola drove away. The next morning, Mr. Setola called back to talk to Mr. Travis Neely, told him that the car was presenting the same problems, that it had presented out at Loma Linda's. (End of p.4)

SECOND COMPLAINTS TO BOB SCHMIDT CHEVROLET ABOUT THE CORVETTE, DECEMBER 9, 1985

After MR. Setola had received the Corvette back on December 7, 1985, he stated that the car still failed to perform as it had failed to perform at the Loma Linda's. The car would stall out, whenever, he applied the brakes to stop the car, like at a stop sign or at a red light. He also states that from the very beginning, that the brake pedal had been harder than usual for a brake

pedal to depress or push down. He says also that when he made a sharp right hand turn, that the car would stall out. MR. Setola also noticed that the car after December 7, 1985, had started to have a humming noise in the rear, like metal grinding against metal. MR. Setola told Mr. Travis Neely all of this. Mr. Neely said, for Mr. Setola to bring in the car and he did. Then, when MR. Setola brought the car into Bob Schmidt's on December 9, 1985, he talked with Elle, a lady service writer, also to the other service manager, named Mike. HE told them all of the above to wit: After Mr. Setola had told Mr. Travis Neely of Bob Schmidt Chevrolet on December 9, 1985, as mentioned above, Mr. Travis Neely says words to the effect: All cars have problems, this car has got some problems, we'll take care of it. The car was left there, and to MR. Setola's recollection, it was picked up later that day. After Bob Schmidt had called him to tell him

the car was ready, he went there, MR. Setola then talked with Elle Schulelr, Mike. Mike the other service manager, and Travis Neely. Mike, the service manager, said they didn't have injectors, but would order them, and would call Frank setola when the injectors came in. That is the only thing they said was wrong with the car (End of p.5) Mr. Travis Neely had said drive it for a couple of days to see how it runs. Mr. Setola did, and brought it back to Bob Schmidt's on December 9, 1985.(End of P.6)

COMPLAINTS AND HISTORY OF THE CORVETTE PROBLEMS DECEMBER 9, 1985 TO DECEMBER 19, 1985

After December 9, 1985, MR. Setola noticed in the Corvette that the Corvette was making a humming noise in the back, a scraping noise, like metal against metal, identified only in the rear; there was an antifreeze leak, dome lights were not working, doors were starting to leak rain, the driver's seat would not move, the electrical

system in the car was not working right, and he was making numerous calls to MR. Travis Neely about these complaints.

Mr. Setola believes that he received the Corvette back from Bob Schmidt Chevrolet on December 9, 1985. While he is not sure, he believes that he then drove the Corvette to New JErsey. HE knows that he drove it to NEw JErsey, according to his recollection, sometime between December 9, 1985, and December 19, 1985. He recalls, he was in Seaside, NEw Jersey, came up to a red light, went to press the brakes, the brake pedal would nto go down, and he went through the red light. This scared him; about a mile down the road from where this happened, was the Town and Country Chevrolet, in Tom's River, NEw Jersey, The Town and Country Chevrolet is a big Chevrolet agency. Mr. Setola drove his car there, it was looked at by the Service Department, about an hour, and then the Service man told Mr. Setola

that they did not want to do any work on the car. Mr. Setola had told them that the car was making funny noises in the rear, that the car would not stop when he applied the brakes at a red light, and that the steering was shaking as he was driving; that is all that the can remember right now. He telephoned Bob Schmidt Chevrolet, and was unable to get Mr. Travis Neely, talked with some service department man, as he recalls, told them what he was facing, and they said to have the car towed back to Bob Schmidt. Town and Country Chevrolet then gave Mr. Setola the name of a tow truck place that would tow Mr. Setola's Corvette back to Bob Schmidt, and the car was towed there. Bob Schmidt refused to pay for the towing bill, saying it was not covered by the insurance. Mr. Setola paid the bill, the car was released to Bob Schmidt Chevrolet. The car was put into the Service Bay; and then the tow truck man left with his tow truck. This

tow truck man observed, as did Mr. Setola, a Service Department man for Bob Schmidt Chevroelt writing up a repair order for Corvette. (End of P. 7)

When the Corvette was brought back to Bob Schmidt, then, Mr. Setola, told the Bob Schmidt people, including the service repair order writer, that the brake pedal would not go down, the brakes had not functioned, causing him to go through a red light, that there were loud noises in the rear end of the car, that the steering wheel was shakey, when driving. Bob Schmidt Chevrolet had then looked at the car, they said there was nothing wrong with the car. Mr. Setola received the car back that day. Right there at Bob Schmidt Chevrolet, he drove the car, checked the brakes, and they seemed to be working better than they had in New Jersey, and he thought it was safe to drive the Corvette and did. One of the mechanics, at Bob Schmidt, a tall, skinny person, with a twitch

in his eye, said that he had test driven the Corvette, and that the car was fine. This was sometime around December 13, or December 14, 1985, as Mr. Setola recalls. Mr. Setola then drove the car, and in a couple of days, noticed that the brakes were not functioning properly, it was hard to push the pedal down, and that the rear end started locking up, and it (end of p. 8) was difficult to stop the car. Then the car locked up, it was difficult to accelerate, had to push the accelerator, or foot feed down. Somewhere along in here, MR. Setola was told by Mr. Travis Neely that he did not want to hear any more complaints, and then Mr. Setola, in keeping Bob Schmidt informed, talked with somebody in the Service Department.

About this time, sometime along the December or December 17 or 18, 1985, he was driving the car, when the left rear tire hits a hole in the road, blows out and puts the little spare tire wheel on. After the

tire blew out in the nighttime, Mr. Setola called them, the next morning, they stated that the tire was under warranty, and should be taken to a Goodyear dealer. Mr. Setola did, got a new tire from Goodyear. (End of p. 9)

STATEMENT OF DEALINGS WITH BOB SCHMIDT CHEVROLET DECEMBER 19, 1985

On December 19, 1985, Mr. Setola brought in the Corvette to Bob Schmidt Chevrolet, about 8:30 AM, after telephoning first to Mr. Travis Neely. He told him about all the complaints, that are shown on Repair Order 56862. MR. Setola was yelling and screaming about the complaints, and Elle brought Mike in. Mike said he would give a call in the afternoon as to when it would be finished.

Here, on Page 1, of Repair Order 56862 ont he left side under, "Part Number Description," there are some words written in and then stricken out. The question natur-

ally arises: What is shown by the words which were stricken out? Is this because fluid was put into the brake system which contaminated the fluids in the brake system?

Also, Mr. Setola points out that on the photo copies supplied by Attorney Marcia A. Wagner, that on the original first sheet for the first sheet of Repair Order 56862, there is handwriting under the, "Part Number and Description,", but on the same page, which is the third page, marked up at the top in the very left hand corner, "3-13", there is no such description about such part and Part Number and Description, and likewise, there is additional writing on the apparent Page 2 of 2 no explanation. On one copy of Page 2 of the December 19, 1985, work order are the words, in heavy black ink, "will have to take to Tire Co."

Why those words appear on one, and don't appear on another, and this also shows the need for a Deposition, as had been re-

quested before the close of the Discovery by Attorney Rust, of Attorney Wagner, and of Attorney Farris, and obviously there is a (End of P. 10) need now, to get to these matters. To resolve, whether such entires have any bearing on the introduction into the Corvette of a hydrocarbon mineral oil or other contaminant, and for other points as well. Likewise, there is a difference in the size of the writing in the words, "Void."

On the afternoon of December 19, 1985, Mr. Setola received a call from MR. Travis Neely. Mr. Setola went to the Bob Schmidt Chevrolet, and Mr. Neely said there was a problem. MR. Setola then, as requested, went to Bob Schmidt to discuss the matter.

Also on the December 19, 1985, work order 56862, on oen copy there is a delivery date of December 3, 1985, and on another copy of Page 1 of Work ORder 56862, there is no delivery date shown, and the same sheet has on upper right top a number with the last

three numbers, 304, whereas another copy has the number 504. Why the difference?

On Page 2 of Work Order 56862, there are the following words which are on one copy, but not both copies:

At top: "Will have to take to tire co"

At lower half: "HOrn inop. and cassette player eats tapes."

Mr. Setola and his attorney claim such discrepancies should be investigated by Depsoition. Someone put the contaminating oil into the brake system. General Motors or Bob Schmidt' These discrepancies raise a substantial question as to whether there are additional records, which have not been disclosed to Bob Schmidt's Counsel.

MR. Setola then went back to Bob Schmidt Chevrolet, talked (End of p. 11) with Mr. travis Neely and Mike, the other Service Manager, and Elle was present, but did not talk. At first, Mr. Neely said it would be two weeks for the car to be fixed, and then

MR. Setola said, "Fine. When can you start working on it?" Mr. Travis Neely said, "Four or five days, if not longer, because the parts were not there." MR. Setola became irate because he said he was having to go out of town. MR. Travis Neely said it was Christmastime, there were too many cars ahead of MR. Setola's to be fixed, and to bring the car back after the holidays, and then, when Mr. Setola asked for his car, then, the mechanic was still working on it, apparently, putting something back together, and then they gave him the keys to the Corvette and said, "HEre is your car; bring it back."

After Mr. Setola got his car back from Bob Schmidt on December 19, 1985, and he had the same problems that had caused him to bring the car in on December 9, 1985.

Mr. Setola met Cheryl Ann Krall on December 22, 1985. (End of p. 12)

STATEMENT OF HISTORY OF COMPLAINTS - CORVETTE DECEMBER 19, 1985 to JANUARY 23, 1986

MR. Setola says that basically the Cor-

vette was still showing the same brake problems that he had noticed from the very beginning. The brake pedal was hard to push down, but he was able to use it, to stop the car, although he also used downshifting to slow the car. Mr. Setola says that the brake pedal was harder to push down than it had been in originally at Loma Linda, and it took more to slow and stop the car.

There were metal noises coming from the rear of the car and the rear wheels were still locking; they would stop turning, then stop, and then start turning again, like something would grab them, then they would release, they would go again.

During this period of time, Mr. Setola went to New Jersey, worked some with his brother; while there, he had these problems mentioned above, with his car. He telephoned then to Bob Schmidt Chevrolet, talked with Mr. Travis Neely, who would then put him on the phone with a service manager,

and the service manager said that there was nothing wrong with the car. On the highway, when the car was being driven from New Jersey back to Ohio, the car would shake and vibrate at a highway speed of fifty miles per hour or over. (End of p. 13)

CONTACTS WITH BOB SCHMIDT CHEVROLET
JANUARY 23, 1986

Mr. Setola can remember making the complaint to Bob Schmidt Chevrolet that are reflected on the Work Orders, Bob Schmidt, for the January 23, 1986, work order No. 57828.

Mr. Setola states that he advised the Service persons who wrote up the work order, and with whom he was talking, that the brake pedal still worked hard, and the brakes were not functioning, and were hard to stopt he car. Bob Schmidt stated that they would check into it.

The car was in Bob Schmidt's from January 23, 1986, through January 29, 1986, when Mr. Setola received a call and picked up the car somewhere around 5:00 PM. When

Mr. Setola then talked with the service people, they said the car was operating all right, there was nothing basically really wrong with the car, nothing wrong with the brakes, they had tested everything and there was nothing wrong with the car.

Mr. Setola then drove the Corvette to his mother's place, at 333 Rexham, Maumee. Mr. Setola says that whenever the car was driven into the driveway at his mother's garage, that he applied the brakes, but the brakes did not stop the car. He then called into Bob Schmidt Chevrolet, told them that the brakes were not working. Bob Schmidt said that Mr. Setola did not know what he was talking about, there was nothing wrong with the car, just the drive the car, because there is nothing wrong with the car.

Then Mr. Setola drove the car to where he was living at Five Points Road, Perrysburg, Ohio, on the south side of Perrysburg. (End of p. 14)

STATEMENT OF EVENTS LEADING UP TO COLLISION
JANUARY 30, 1986

On Thursday, January 30, 1986, when MR. Setola tried to start the Corvette, it would not start. They had to jump start it with help from Chris Krall. After the car would not start, Mr. Setola called Bob Schmidt, told them that the car would not start, and Mr. Setola told Bob Schmidt that the brake pedal was hard to push down, the brakes were not working, and Bob Schmidt Chevrolet said that the car had been test driven for the brakes, the brakes were all right, the car was all right to drive.

In driving from Five Points Road, south of Perrysburg, into downtown Toledo, MR. Setola and his wife, Cheryl, drove the Corvette onto U.S. 475, and as they went along, coming to the place where U.S. 475 and I-75 split, there was a lot of traffic, MR. Setola had to apply the brakes. When Mr.

Setola hit the brakes, the brake pedal was hard, but it was braking the car. Then the car stalled and died out. MR. Setola had to push the car over to the side of the road, started it again. The car was making a humming noise, and a metal scraping noise. Also, the car was shaking, vibrating. The car was hard to steer. The loud noises or humming noises were like one metal grinding against another.

As Mr. Setola drove the Corvette from Five Points Road onto I-75 into downtown Toledo, when he got to downtown Toledo, MR. Setola states that as the car got near to downtown Toledo, that all four tires were smoking; and also, that the car did not seem like it wanted to roll, when he took his foot off the bas pedal. Everytime he took his foot off the gas pedal, the motor seemed (End of p. 15) it wanted to die, and the whole car would stop, and die and the car was very hot. All of the four tires were smoking.